

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

SEARS PETROLEUM & TRANSPORT
CORP., *et ano.*

Plaintiffs,

Civ. Action No.
5:03-CV-1120 (DEP)

vs.

ARCHER DANIELS MIDLAND COMPANY,
et al.,

Defendants.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFFS:

LATHROP, GAGE LAW FIRM
230 Park Avenue
Suite 1847
New York, New York 10169

WILLIAM R. HANSEN, ESQ.
BERNADETTE REILLY, ESQ.

DUANE, MORRIS LAW FIRM
380 Lexington Avenue
New York, NY 10168

JOHN DELLAPORTAS, ESQ.

WALL, MARJAMA LAW FIRM
101 South Salina Street
Suite 400
Syracuse, NY 13202

INDRANIL MUKERJI, ESQ

FOR ADM DEFENDANTS:

KIRKPATRICK & LOCKHART, LLP
599 Lexington Ave.
New York, NY 10022-6030

TARA C. CLANCY, ESQ.
CHRIS CENTURELLI, ESQ.

HISCOCK & BARCLAY, LLP
Financial Plaza
221 South Warren Street
Syracuse, NY 13221-4878

JOHN D. COOK, ESQ
ROBERT A. BARRER, ESQ.

FOR MLI DEFENDANT:

HEDMAN, COSTIGAN LAW FIRM
1185 Avenue of the Americas
20th Floor
New York, NY 10036-2646

JOHN F. VOLPE, ESQ.

DEVORSETZ, STINZIANO LAW FIRM TIMOTHY LAMBRECHT, ESQ.
555 East Genesee Street
Syracuse, New York 13202-2159

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in connection with this action is a motion filed on behalf of defendants Archer Daniels Midland Company (“ADM”), Deicer, USA, LLC (“Deicer”), Glacial Technologies, LLC (“GT”) and Minnesota Corn Processors, LLC (“MCP”) (collectively the “ADM defendants”) seeking dismissal of counts three and four of plaintiffs’ second amended complaint for non-compliance with the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure, and failure to state a claim upon which relief may be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Dkt. No. 91. In their motion, the ADM defendants argue that plaintiffs’ third cause of action,

which alleges fraudulent misrepresentation, is not pleaded with the specificity required under the rules governing federal pleadings, and that both that cause of action and the unfair competition claim set forth in the fourth count are legally deficient. See *id.* Defendant MLI Associates, LLC has joined in that motion. Dkt. No. 92. Defendants' motions are opposed by plaintiffs Sears Petroleum and Transport Corp. and Sears Ecological Applications Company, LLC. Dkt. No. 96.

Oral argument in connection with defendants' motions was heard on January 11, 2006. At the close of argument a bench decision, which is incorporated herein by reference, was rendered granting in part, but otherwise denying, the pending dismissal motions. Based upon the foregoing, and upon due deliberation, it is hereby

ORDERED as follows:

- 1) The motion of defendant MLI Associates, LLC to dismiss plaintiff's third cause of action as against that defendant for failure to plead fraud with the specificity required under Rule 9(b) of the Federal Rules of Civil Procedure is GRANTED, with leave to plaintiffs to replead within thirty (30) days of the date of this order.
- 2) The motion of the ADM defendants to dismiss plaintiffs' third cause of action for failure to plead fraud with the requisite degree of

specificity is DENIED.

3) The motions of all defendants seeking dismissal of plaintiffs' fourth cause of action, alleging unfair competition for failure to state a legally cognizable claim, is GRANTED.

4) The defendants' motions to dismiss plaintiffs' third cause of action for failure to state a claim upon which relief may be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, is denied. This denial is without prejudice for the defendants' right to reassert the arguments now raised in support of their motion at a later juncture, including on motion for summary judgment or at trial.

5) The clerk is directed to promptly forward copies of this order to the parties via electronic means.



David E. Peebles
David E. Peebles
U.S. Magistrate Judge

Dated: January 17, 2006
Syracuse, NY